

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNICORN INVESTMENT BANK,  
B.S.C.(c), a foreign corporation,  
and THE UNICORN GROUP, a foreign  
corporation,

Plaintiffs,

v.

MATHEWS KURUVILLA, an individual,  
and MK CAPITAL, LLC, a North  
Carolina limited liability  
company,

Defendants.

No. CV-04-3135-FVS

ORDER

**THIS MATTER** comes before the Court based upon the defendants' motion to dismiss. They are represented by Michael Vaska and Ramsey Ramerman. The plaintiffs are represented by Randall P. Beighle and Laura T. Morse.

**BACKGROUND**

"The Unicorn Group" is a Cayman Islands company. During the Fall of 2003, The Unicorn Group hired Matthews Kuruvilla as a financial consultant. Mr. Kuruvilla is a resident of the State of North Carolina and is the managing member of MK Capital, LLC, a North Carolina limited liability company. After retaining Mr. Kuruvilla, The Unicorn Group formed Unicorn Investment Bank, B.S.C.(c). The latter is an investment bank that is organized and chartered under the laws of the Kingdom of Bahrain. Once Unicorn Investment Bank began operating, it hired Mr. Kuruvilla as its Deputy Manager of

1 Corporate Finance. His principal responsibility was to negotiate  
2 investment projects for the bank.

3 Wilkinson Corporation is a Washington corporation that is  
4 located in Yakima. Wilkinson raises money for real estate  
5 investments and then manages the properties for the investors.  
6 During roughly the same period that The Unicorn Group was looking for  
7 a financial consultant, Wilkinson also was looking for a financial  
8 consultant. Wilkinson contacted Mr. Kuruvilla and explained its  
9 interest in obtaining someone to seek investors in Europe and the  
10 Middle East. Despite having agreed to work for The Unicorn Group,  
11 Mr. Kuruvilla agreed to work for Wilkinson. Mr. Kuruvilla did not  
12 disclose to Wilkinson his relationship with The Unicorn Group and  
13 Unicorn Investment Bank, nor did he disclose to them his relationship  
14 with Wilkinson. Instead, he subsequently arranged for Wilkinson and  
15 Unicorn Investment Bank to enter into a joint real estate venture.  
16 As Wilkinson and Unicorn Investment Bank prepared to close the  
17 transaction, they learned of Mr. Kuruvilla's alleged duplicity. Each  
18 organization terminated its relationship with Mr. Kuruvilla.  
19 However, they decided to proceed with the joint venture. As a  
20 result, Wilkinson may be required to pay Mr. Kuruvilla a fee of one  
21 million dollars. At Unicorn Investment Bank's request, Wilkinson  
22 placed his potential fee in escrow in a Washington bank.

23 On December 8, 2004, Unicorn Investment Bank and The Unicorn  
24 Group filed the instant action. They seek a declaratory judgment  
25 providing that Mr. Kuruvilla is not entitled to the money Wilkinson  
26 placed in escrow, and that, as between Mr. Kuruvilla and the Unicorn  
Investment Bank, the fee belongs to the bank not to him. The  
defendants move to dismiss on the ground they are not subject to  
personal jurisdiction in the State of Washington. Fed.R.Civ.P.

1 12(b)(2).

2 **APPLICABLE LAW**

3 State law governs whether the defendants are subject to personal  
4 jurisdiction in the State of Washington. See *Cubbage v. Merchant*,  
5 744 F.2d 665, 667 (9th Cir.1984), cert. denied, 470 U.S. 1005, 105  
6 S.Ct. 1359, 84 L.Ed.2d 380 (1985). Federal law governs whether  
7 exercising personal jurisdiction would violate the defendants' right  
8 to due process. *Id.* See also 4A Charles Alan Wright & Arthur R.  
9 Miller, *Federal Practice and Procedure* § 1075, at 411-12 (3d ed.2002)  
10 ("Federal law always is controlling to determine whether the  
11 constitutional principles of due process . . . have been  
satisfied.").

12 **GENERAL JURISDICTION**

13 A nonresident corporation is subject to general jurisdiction in  
14 the State of Washington if it was doing business in this state at the  
15 time the cause of action accrued. RCW 4.28.080(10).<sup>1</sup> *Im Ex Trading*  
16 *Co. v. Raad*, 92 Wn. App. 529, 537, 963 P.2d 952 (1998), review  
17 denied, 137 Wn.2d 1023, 980 P.2d 1280 (1999). A corporation is doing  
18 business in this state when its activities in Washington are  
19 "substantial and continuous." *Raymond v. Robinson*, 104 Wn. App. 627,  
20 633, 15 P.3d 697 (2001). This test is consistent with the  
21 requirements of due process. *Cf. Easter v. American West Financial*,  
22 381 F.3d 948, 960 (9th Cir.2004) ("A defendant is subject to general

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23 <sup>1</sup>RCW 4.28.080(10) provides that, in the case of suit against  
24 "a foreign corporation or nonresident joint stock company,  
25 partnership or association doing business within this state," the  
26 summons may be served upon "any agent, cashier or secretary  
thereof." Washington appellate courts have held that this  
statute creates general jurisdiction. See, e.g., *Hein v. Taco*  
*Bell, Inc.*, 60 Wash. App. 325, 328-29, 803 P.2d 329 (1991)  
(citation omitted).

1 jurisdiction only where the defendant's contacts with a forum are  
2 substantial or continuous and systematic."); *Bancroft & Masters, Inc.*  
3 *v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000) ("A  
4 defendant whose contacts with a state are 'substantial' or  
5 'continuous and systematic' can be haled into court in that state in  
6 any action, even if the action is unrelated to those contacts."  
7 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S.  
8 408, 415, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984))). Indeed,  
9 Washington courts apply the "doing business" test in order to make  
10 certain that due process concerns are addressed before a nonresident  
11 defendant is subjected to general jurisdiction in Washington. *Im Ex*  
12 *Trading Co.*, 92 Wn. App. at 537. Since "the 'doing business' and due  
13 process inquiries are the same," *Amoco Egypt Oil Co. v. Leonis*  
14 *Navigation Co., Inc.*, 1 F.3d 848, 851 (9th Cir.1993) (citations  
15 omitted), the "statutory and constitutional standards merge into a  
16 single due process test." *Id.* (internal punctuation and citations  
17 omitted).

18 The plaintiffs rely upon Mr. Kuruvilla's employment by Wilkinson  
19 to establish the existence of substantial contacts with the State of  
20 Washington. As the plaintiffs point out, he was employed by  
21 Wilkinson for approximately one year. During that period, say the  
22 plaintiffs, Mr. Kuruvilla communicated regularly with colleagues in  
23 Washington and traveled to this state on at least one occasion.  
24 According to the plaintiffs, the continuous and systematic nature of  
25 Mr. Kuruvilla's contacts with Washington can be measured, in part, by  
26 the fact he has been paid \$125,000 by Wilkinson and by the fact he's  
claiming the money Wilkinson placed in escrow.

"The standard for establishing general jurisdiction is 'fairly  
high,' . . . and requires that the defendant's contacts be of the

1 sort that approximate physical presence." *Bancroft & Masters, Inc.*,  
2 223 F.3d at 1086 (citations omitted). While the circumstances cited  
3 by the plaintiffs (a lucrative employment contract, regular  
4 communication, at least one trip to Washington, and receipt of wages)  
5 indicate that Mr. Kuruvilla's contacts with this state were not  
6 insignificant, these circumstances cannot be said to approximate  
7 physical presence. This conclusion is reinforced by the  
8 countervailing circumstances cited by Mr. Kuruvilla. As he points  
9 out (and the plaintiffs concede), he is not domiciled in Washington.  
10 He has never owned a home or rented an apartment in this state. He  
11 does not have a representative here. Furthermore, the only  
12 Washington employer for whom he has worked is Wilkinson, and  
13 Wilkinson hired him to find investors in Europe and the Middle East.

#### 14 **SPECIFIC JURISDICTION**

15 Specific jurisdiction is created by RCW 4.28.185, which is  
16 Washington's long-arm statute. *Raymond*, 104 Wn. App. at 636-37. The  
17 plaintiffs are relying upon subsections (1)(a) and (1)(b) of RCW  
18 4.28.185. Both sides agree that in Washington, specific jurisdiction  
19 extends to the limit imposed by the due process clause. *Omeluk v.*  
20 *Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir.1995). The  
21 requirements of due process are satisfied "where (1) the non-resident  
22 defendant has purposefully directed his activities or consummated  
23 some transaction with the forum or a resident thereof, or performed  
24 some act by which he purposefully availed himself of the privileges  
25 of conducting activities in the forum, thereby invoking the benefits  
26 and protections of its laws; (2) the claim arises out of or relates  
to the defendant's forum-related activities; and (3) the exercise of  
jurisdiction is reasonable." *Bancroft & Masters, Inc.*, 223 F.3d at  
1086.

1           **PURPOSEFUL AVAILMENT**

2           The first prong of the test for specific jurisdiction is  
3 sometimes referred to as the purposeful-availment prong. In the  
4 Ninth Circuit, the term "purposeful availment" includes two distinct  
5 concepts: "purposeful availment" and "purposeful direction."  
6 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th  
7 Cir.2004). The term "purposeful availment" is associated with  
8 contract claims. The term "purposeful direction" is associated with  
9 tort claims. *Id.*

10          Insofar as contract claims are concerned, the issue typically is  
11 whether the defendant's contacts with the forum are such that the  
12 defendant *himself* has created a substantial connection with it.  
13 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174,  
14 2184, 85 L.Ed.2d 528 (1985) (emphasis in original). This may occur  
15 where, for example, "the defendant 'deliberately' has engaged in  
16 significant activities within a State," *id.* at 475-76, 105 S.Ct. at  
17 2184 (citation omitted), or the defendant "has created continuing  
18 obligations between himself and residents of the forum[.]" *Id.* at 476  
19 (internal punctuation and citation omitted). See also *Gray & Co. v.*  
20 *Firstenberg Machinery Co.*, 913 F.2d 758, 760 (9th Cir.1990) (quoting  
21 *Burger King*, 471 U.S. at 475-76, 105 S.Ct. at 2184).

22          Insofar as tort claims are concerned, the issue typically is  
23 whether the defendant performed some act in a foreign state that he  
24 both aimed at the forum and knew would have an adverse effect in the  
25 forum upon the plaintiff. *Bancroft & Masters, Inc.*, 223 F.3d at  
26 1087. The Ninth Circuit "evaluates purposeful direction under the  
three-part 'effects' test traceable to the Supreme Court's decision  
in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804  
(1984)." *Schwarzenegger*, 374 F.3d at 803. "[Under] *Calder*, the

1 'effects' test requires that the defendant allegedly have (1)  
2 committed an intentional act, (2) expressly aimed at the forum state,  
3 (3) causing harm that the defendant knows is likely to be suffered in  
4 the forum state." *Id.* (quoting *Dole Food Co., Inc. v. Watts*, 303  
5 F.3d 1104, 1111 (9th Cir. 2002)).

6 A. Availment

7 The plaintiffs cite a number of circumstances that are relevant  
8 to the issue of availment. To begin with, Wilkinson hired Mr.  
9 Kuruvilla to locate potential investors and paid him generously for  
10 his efforts. As a Wilkinson employee, Mr. Kuruvilla communicated  
11 regularly with his colleagues in Washington, traveling to this state  
12 on one occasion to negotiate a modification of his contract.  
13 Finally, he is seeking to recover the money placed in escrow by  
14 Wilkinson at the plaintiffs' request.

15 "[A] non-resident defendant's act of soliciting business in the  
16 forum state will generally be considered purposeful availment if that  
17 solicitation results in contract negotiations or the transaction of  
18 business." *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 381 (9th  
19 Cir.1990), *rev'd on other grounds*, 499 U.S. 585, 111 S.Ct. 1522, 113  
20 L.Ed.2d 622 (1991). Here, there is no evidence Mr. Kuruvilla  
21 solicited employment by Wilkinson; rather, it appears Wilkinson  
22 initiated contact with him. *Cf. Roth v. García Marquez*, 942 F.2d  
23 617, 621-22 (9th Cir.1991) ("There are two facts . . . that  
24 marginally work in [the defendants'] favor: their minimal physical  
25 presence in the forum and the fact that it was [the plaintiff] who  
26 made the sedulous efforts of solicitation."). As the plaintiffs  
point out, Mr. Kuruvilla eventually agreed to work for Wilkinson --  
but by itself, the fact they executed an employment agreement does  
not constitute availment. Additional analysis is required. The

1 Court must consider "'prior negotiations and contemplated future  
2 consequences, along with the terms of the contract and the parties'  
3 actual course of dealing[.]'" *Gray*, 913 F.2d at 760 (quoting *Burger*  
4 *King*, 471 U.S. at 479, 105 S.Ct. at 2185). In *Roth*, for example, the  
5 Ninth Circuit upheld the exercise of personal jurisdiction. "This is  
6 not," said the circuit court, "an instance where the contract was a  
7 one-shot deal that was merely negotiated and signed by one party in  
8 the forum; on the contrary, most of the future of the contract would  
9 have centered on the forum." 942 F.2d at 622. *Roth* is readily  
10 distinguishable. As the plaintiffs acknowledge, Wilkinson hired Mr.  
11 Kuruvilla to find investors in Europe and the Middle East, not in the  
12 State of Washington. See *FDIC v. British-American Ins. Co., Ltd.*,  
13 828 F.2d 1439, 1443 (9th Cir.1987) ("The subject of the contract was  
14 in Fiji, the governing law was Fiji's, and the defendant's only  
15 significant performance in California was picking up a check for an  
16 already completed and executed contract."). Mr. Kuruvilla may have  
17 been well paid for his services. However, "the receipt of payment  
18 alone for services rendered outside the forum state is not sufficient  
19 to support personal jurisdiction." *Id.* (citing *Pacific Atlantic*  
20 *Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1329 (9th Cir.1985)).  
21 Nor can much significance be attached either to Mr. Kuruvilla's  
22 single trip to this forum, see *Sher v. Johnson*, 911 F.2d 1357, 1363  
23 (9th Cir.1990) ("[t]he three trips to California were discrete events  
24 arising out of a case centered entirely in Florida"), or to Mr.  
25 Kuruvilla's business communications with his colleagues. See  
26 *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir.1985)  
("ordinarily[, the] use of the mails, telephone, or other  
international communications simply do not qualify as purposeful  
activity invoking the benefits and protection of the [forum] state.'")



1 (quoting *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de*  
2 *Costa Rica*, 614 F.2d 1247, 1254 (9th Cir.1980))).<sup>2</sup>

3 B. Direction

4 The plaintiffs allege Mr. Kuruvilla owed them a duty of loyalty  
5 based upon his agreement to solicit investors for them. They further  
6 allege he breached this duty by working for Wilkinson in essentially  
7 the same capacity and failing to disclose the apparent conflict of  
8 interest. According to the plaintiffs, Mr. Kuruvilla's trip to  
9 Washington and each of his communications with his colleagues in this  
10 state contributed to the breach and, thus, should be treated as a  
11 part of a tortious scheme. Since, in the plaintiffs' opinion, Mr.  
12 Kuruvilla's tortious scheme involved acts that occurred in this  
13 forum, they say he committed a tort within this state for purposes of  
RCW 4.28.185(1)(b).

14 Clearly, this is not a typical purposeful direction case. The  
15 plaintiffs are not residents of Washington. Nor are they arguing Mr.  
16 Kuruvilla performed an act in a foreign state that he both aimed at  
17 this forum and knew would injure them here. To the contrary, they  
18 are arguing he committed tortious acts in Washington that he knew  
19 would injure them outside this state. This argument poses an  
20 interesting question: Is a person who is not a resident of this  
21 state subject to personal jurisdiction in this state if he allegedly  
22 commits a tort in this state that injures another nonresident in a  
foreign state? To date, the plaintiffs have not provided a

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23  
24 <sup>2</sup>A circumstance that arguably might alter this determination  
25 is the presence in this state of the funds Wilkinson placed in  
26 escrow. However, the plaintiffs are not attempting to assert  
jurisdiction under RCW 4.28.185(1)(c) or any other equivalent  
statute, and Mr. Kuruvilla is not relying upon a court in this  
forum to obtain the disputed funds.

1 satisfactory answer to this question.

2 **CONCLUSION**

3 As the record now stands, the plaintiffs have failed to satisfy  
4 the first prong of the specific-jurisdiction test. Since the three  
5 prongs of this test are conjunctive, *Rano v. Sipa Press, Inc.*, 987  
6 F.2d 580, 588 (9th Cir.1993), it is unnecessary to address the two  
7 remaining prongs of the test. *McGlinchy v. Shell Chemical Co.*, 845  
8 F.2d 802, 817 (9th Cir.1988).

8 **IT IS HEREBY ORDERED:**

9 1. The plaintiffs' motion to expedite (**Ct. Rec. 20**) is denied.

10 2. The defendants' motion to dismiss (**Ct. Rec. 11**) is granted.

11 **IT IS SO ORDERED.** The District Court Executive is hereby  
12 directed to enter this order and furnish copies to counsel.

13 **DATED** this 16th day of May, 2005.

14 s/ Fred Van Sickle  
15 Fred Van Sickle  
16 Chief United States District Judge  
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